SC92750

IN THE SUPREME COURT OF MISSOURI

THOMAS A. SCHWEICH, Missouri State Auditor,

Appellant/Cross-Respondent,

vs.

JEREMIAH W. NIXON, Governor of the State of Missouri,

Respondent-Cross-Appellant.

From the Circuit Court of Cole County, Missouri,
The Honorable Jon E. Beetem, Judge

BRIEF OF RESPONDENT/CROSS-APPELLANT JEREMIAH W. NIXON

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JURISDICTIONAL STATEMENT

Because the Auditor argued and the circuit court held that the portions of House Bills 8 and 12 (2011) stating appropriations with estimated or "E" amounts are invalid, this is a "case[] involving the validity … of a statute or provision of the constitution of this state" (Missouri Constitution, Art. V, § 3). Thus the case falls within the jurisdiction of this Court.

STATEMENT OF FACTS

The Fiscal Year 2012 Budget.

This appeal involves appropriations and expenditures for fiscal year ("FY") 2012, which began July 1, 2011 and ended June 30, 2012.

Prior to the submission of the Governor's proposed budget, leaders of the executive and legislative branches jointly formulated a "consensus revenue estimate" ("CRE") for FY 2012 of $7,295,300,000. Legal File ("LF") 129. The CRE did not include all expected revenues, and it did not take into account any reduction in the franchise tax rate, though the General Assembly passed and the Governor signed such a reduction. *See* LF 96-97.

Following receipt of the proposed budget and the CRE, the 2011 General Assembly enacted appropriations bills for FY 2012. The total amount appropriated was $23,198,894,710. Defendant's Exhibit 3 (LF 365). The appropriations bills included some appropriations specified with "estimated" amounts (*see* H.B. 1-15, 17, 18, 21, and 22, A.L. 2011 pp. 18-206,); the total was calculated using those estimates.

After the Governor vetoed portions of the appropriations bills, the total that remained appropriated for FY 2012 was $23,198,864,710 (again, using the "estimated" amounts). LF 365.

On June 10, 2011, Linda Luebbering, Director of the Division of Budget and Planning ("Budget Director"), announced that as of July 1, 2011, certain expenditures would be restricted. Exhibit A to Petition, LF 16-21.

On April 27, 2012 the Governor signed H.B. 2014, a supplemental appropriations bill, raising the total amount appropriated for FY 2012 to $23,330,009,111. *See* H.B. 2014 (2012).

The Audit Meetings and Letter.

On July 27, 2011, purportedly as part of a regular audit of the Governor's office, members of the State Auditor's staff met with the Budget Director and discussed the restrictions announced on June 10. LF 106-07. The Budget Director explained the bases for the restrictions and for the estimates on which they were based (*id.*), but she did not provide the Auditor's staff with documentation regarding the restrictions or estimates (LF 62, 460). The Auditor, as State Auditor, followed up with an August 19, 2011, letter, making legal arguments regarding the June 10 restrictions, but not citing any accounting standard or instruction that may have been violated in imposing or documenting those or other restrictions. LF 21-24.

Proceedings Below.

On August 26, 2011, the Auditor filed his Petition, challenging the restrictions announced June 10. LF 6-25. The parties filed cross-motions for summary judgment; the circuit court entered final judgment, granting each party's motion in part. LF 485-489.

CROSS-APPELLANT'S POINTS RELIED ON

1. The trial court erred in granting relief to the Auditor with regard to appropriations and restrictions on expenditures pursuant to appropriations because appellant had no standing to sue as to appropriations or restriction in that neither the Missouri constitution nor any Missouri statute authorizes a state auditor to sue regarding restrictions on such legislative and executive acts.

Art. IV, § 13, Mo. Const.

§ 27.060, RSMo

State ex rel. St. Louis Retail Group v. Kraiberg,

343 S.W.3d 712 (Mo. App. E.D. 2011)

State ex rel. American Family Mut. Ins. Co. v. Clark,

106 S.W.3d 483 (Mo. banc 2003)

State ex rel. Nixon v. American Tobacco Co., Inc.,

34 S.W.3d 122 (Mo. banc 2000)

Brown v. Carnahan, 370 S.W.3d 637 (Mo. banc 2012)

2. The trial court erred in ruling on the constitutional validity of "estimated" or "E" appropriations because the challenge to the validity of those provisions was not raised by the Auditor at the earliest possible opportunity so as to give the trial court authority to rule in that it was not made in the Petition.

City of Florissant v. Rouillard, 495 S.W.2d 418 (Mo. 1973)

3. The trial court erred in ruling on the constitutional validity of "estimated" or "E" appropriations because the General Assembly does not lack authority to enact such appropriations in that the General Assembly has plenary authority and no constitutional provision bars the General Assembly from using "estimated" amounts in line items in appropriations bills.

Kan. City Premier Apartments, Inc. v. Mo. Real Estate Comm'n,
344 S.W.3d 160 (Mo. banc 2011)

Fust v. Attorney General for the State of Mo.,
947 S.W.2d 424 (Mo. banc 1997)

ARGUMENT

I. The Auditor does not have standing in his official capacity to challenge appropriations bills or the Governor's restrictions on expenditures pursuant to appropriations bills. (Addressing Cross-appellant's Point 1.)[1]

Respondent-Cross-appellant's Point Relied On 1:

The trial court erred in granting relief to the Auditor with regard to appropriations and restrictions on expenditures pursuant to appropriations because appellant had no standing to sue as to appropriations or restriction in that neither the Missouri constitution nor any Missouri statute authorizes a state auditor to sue regarding restrictions on such legislative and executive acts.

Preliminary to all other questions presented here is whether—and if so, to what degree—the Auditor may, in his official capacity as State Auditor, sue the Governor regarding the validity of appropriations and restrictions on expenditures pursuant to appropriations. The circuit court did not address standing. But "[a] party cannot waive lack of standing. The court may

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[1] Standing is a question of law, to be addressed by this Court *de novo*. *CACH, LLC v. Askew*, 358 S.W.3d 58, 61 (Mo. banc 2012).

consider the issue of standing sua sponte at any time." *State ex rel. St. Louis Retail Group v. Kraiberg*, 343 S.W.3d 712, 715-16 (Mo. App. E.D. 2011) (citations omitted). That is a slight overstatement; if "the State stipulates or affirmatively waives standing, then, even as the respondent on appeal, it could not raise the issue." *State v. Ramires*, 152 S.W.3d 385, 397 (Mo. App. W.D. 2004). But here, there was no such stipulation or affirmative wavier. Thus the Court may find that the Auditor lacked standing, vacate the decision below, and remand with instructions that the Petition be dismissed.

Among statewide elected officials, only one has authority to sue to vindicate the rights of the State and its citizens: the Attorney General. That authority comes both from the common law and from statute. *E.g.*, *State ex rel. American Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 495 (Mo. banc 2003) ("With broad power under the common law, the attorney general serves as an advocate for the State of Missouri and its citizens."); *State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 136 (Mo. banc 2000) ("The absence of a provision for specific powers for the attorney general in our constitution vests the office with all of the powers of the attorney general at common law."); § 27.060, RSMo. ("The attorney general shall institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state….").

Here, the alleged interests of the State are being asserted by the Auditor, suing in his official capacity. To take that step, the Auditor would have to identify some grant of power that includes suing the Governor to challenge restrictions on expenditures and the constitutionality of portions of appropriations bills. There is no such authority, neither in the constitution nor in statutes.

The Constitution gives the state auditor authority to "establish appropriate systems of accounting for all public officials of the state, post-audit the accounts of all state agencies and audit the treasury at least once annually." Art. IV, § 13. It then authorizes the General Assembly to assign him responsibility for "other audits and investigations." *Id. See Brown v. Carnahan*, 370 S.W.3d 637, 648 (Mo. banc 2012). And it bars the General Assembly from giving him any "duty … which is not related to the supervising and auditing of the receipt and expenditure of public funds." Art. IV, § 13. Nothing in that section hints at the auditor having authority to sue regarding the validity of statutes or the *non*expenditure of funds. Indeed, the focus on "audits and investigations" strongly suggests that his constitutional role is to study what is happening or has happened, and not to engage in policy debates regarding what can, might, or will happen.

The statutes regarding the state auditor follow that theme: they focus on how to perform audits, not on spending policy or court appearances. *See* Chapter 29, RSMo.

In *Kelly v. Hanson*, 959 S.W.2d 107 (Mo. banc 1997), this Court recognized a narrow exception to the rule that the attorney general, not the auditor, is the state official with standing to proceed in court. The Court began by insisting that the auditor have standing, and looked first to Art. IV, § 13 to find a " 'legally protectable interest' that would entitle her to 'some consequential relief immediate or prospective' against," in that case, the Commissioner of Administration. *Id.* at 109. The Court also looked at Chapter 29. *Id.* The Court rejected the idea that the auditor "merely has the power to establish an accounting system that the rest of state government is free to ignore." *Id.* The Court recognized that the auditor's "legal right to enforce her system for calculating [total state revenue under the Hancock Amendment] and the revenue limit against Respondents is a legally protectable interest that would entitle her to relief against those Respondents. Having shown a legally protectable interest, the Auditor has met the requirements for standing." *Id.* at 110-111.

The only one of the Auditor's claims that could possibly fall within the ambit of *Kelly v. Hanson* would be the claim in his Point III: that the Governor failed to comply with some accounting requirement that the

Constitution authorizes the state auditor to establish. But as discussed in part IV below, the Auditor has never articulated what standard the Governor allegedly ignored. By contrast, State Auditor Kelly gave the courts enough substance that they could actually determine whether the Commissioner of Administration was complying with an identified aspect of the "systems of accounts" instructions that Kelly was constitutionally empowered to establish. Here, by failing to identify any instruction or otherwise specifying what the Governor was actually required to do, the Auditor implicitly concedes that there is no pertinent requirement anywhere in the "system of accounts."

In the Auditor's other claims—those relating to restrictions on expenditures and the validity of "estimated" appropriation line items—he is not even arguably vindicating his "legal right to enforce [his] system for calculating" anything at all. Rather, he is attacking the Governor's exercise of *his* constitutional authority to regulate the rate at which available revenues are spent. If there were a legitimate basis for that attack, it would be for the Attorney General or a taxpayer to make the challenge. Auditors do not have the authority to do so in their official capacity. This Court should refuse to grant him relief as to the restrictions issues on which he lost below, and vacate the decision in his favor on the validity of "estimated" or "E" appropriations.

II. The Governor's restrictions on expenditures from the outset of Fiscal Year 2012 were within his authority under the first clause of Art. IV, § 27. (Responding to Appellant's Point I.)

A. The 1945 Constitution assigned the governor to ensure that the state budget remains balanced, and gives the governor the authority necessary to fulfill that assignment—including the authority to restrict expenditures from the beginning of the fiscal year.

This appeal addresses the meaning and application of Art. IV, § 27:

> The governor may control the rate at which any appropriation is expended during the period of the appropriation by allotment or other means, and may reduce the expenditures of the state or any of its agencies below their appropriations whenever the actual revenues are less than the revenue estimates upon which the appropriations were based.

To understand that language and its application requires some background as to how budgeting, appropriations, and expenditures work. We divide our discussion into three time periods: (1) the development of Missouri's budget system, culminating in Art. IV, § 27 of the 1945 Constitution; (2) what happens each year before the fiscal year begins; and (3) what happens beginning on July 1, during the fiscal year.

1. The constitutionalization of the budget process.

The 1875 Constitution, as adopted, had no provisions dealing specifically with the budget process. The Constitution that the 1943-44 convention presented for ratification, on the other hand, contained several new and greatly expanded provisions specifically addressing the appropriation process and the subsequent administration of such appropriations throughout the fiscal year.

The placement of the budgetary provisions in Article IV of the new constitution was a purposeful expression of the framers' intention to create "executive," as opposed to legislative, "budgetary control." The Chairman of the committee charged with drafting the budgetary provisions introduced those provisions by reference to contemporary developments:

> [W]e, after considerable study both of the budget system established in the state now and the problem of budgetary control, adopted what might be described as an executive budget, the chief responsibility for the budget being placed upon the Governor. We believe that experience indicates that political scientists the country over are more or less

> agreed that the type of budget in which the executive has chief responsibility is the better financial control for this state, and we believe, therefore, that that type of budgetary control should be set up in the Constitution. You will find then that this section freezes into the Constitution a system of executive budget control very much in accord with the present system of budgetary control in the State of Missouri.

1943-1944 Constitutional Debates, Vol. XI at pp. 3116-3117 (May 19, 1944) (remarks by Delegate McCluer).[2]

The framers of the 1945 Constitution drew upon the experience of Missouri's earlier budget reform efforts, which culminated, in 1933, with enactment of Senate Bill 227 (1933). This "Act to establish an executive budget system for the state," Laws 1933, pp. 459-63 (S.B. 227, §§ 1-16) (the "Executive Budget Act"), assigned the governor responsibility to gather revenue estimates and anticipated expenses. Then, with the assistance of the chairman of the state tax commission (as ex officio "budget director"), the

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[2] Missouri's movement toward "executive budget control" was part of a nationwide trend. *See* Briffault, "The Item Veto in State Courts," 66 TEMP. L. REV. 1171, 1180 (1993).

governor submitted to the legislature a "budget setting forth aggregate figures of proposed revenues and expenditures and the balanced relations between the proposed revenues and expenditures and the total expected income and other means of financing the budget." *Id.* at § 7, p. 461.

Missouri's Executive Budget Act also gave the governor new powers regarding the implementation of the budget "after the approval of the appropriation acts by the Governor." *Id.* at § 12, p. 462. For the first time, the governor had statutory authority to regulate the rate at which appropriated funds could be spent. He was given three tools. One was allotment: the governor could establish periodic allotments for each appropriation based upon the needs of the particular recipient and the resources expected to be available. Another was the ability to restrict spending on every appropriation by 3%, and to permit spending of that 3% (even at the end of the fiscal year) only if and when the governor deemed appropriate. And third, the governor could reduce spending authority whenever "it shall appear that revenues in any fund will fall below the estimated revenues for such fund to such extent that the total revenues of such fund will be less than the appropriations from such fund." *Id.*[3]

As noted above, the framers' created an "executive budget" process that was informed by, but not limited to, the provisions of the 1933 Executive Budget Act. The result was the process set forth in §§ 23-27 of Art. IV. Section 23 established both the July-to-June fiscal year and requirements for appropriations. Section 24 constitutionalized and expanded the governor's duty to provide the legislature with a detailed budget proposal, listing all proposed expenditures and estimating the revenue (or proposing legislation to expand revenue) necessary to meet those expenditures. Section 26 then adopted the 1875 Constitution's "item veto" provision, but with the addition of a prohibition against the governor using this power to lower appropriations for schools or the repayment of public debt.

Though §§ 23, 24, and 26 reflected the commitment to an "executive budget," each section merely expanded concepts found in the 1875

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[3] Those delegations of authority still appear in Missouri law. § 33.290, RSMo 2000. The superseding of most (*see* note 4, infra) statutorily delegated authority by a constitutional grant of authority may explain why that section was never amended to conform to the change from biennial to annual budgeting.

Constitution. Section 25 was new; it prohibited the legislature from taking up its own appropriation until it acts upon all of the appropriations recommended in "the budget." But the heart of the framer's shift to an "executive budget" was § 27.

In § 27, the Constitution specifically addressed for the first time the execution of the budget during the fiscal year. Section 27 has two distinct clauses, which serve different purposes, apply at different times, and grant to the governor separate and independent powers. Under the first, at issue here and discussed in this part II, the governor "may control the rate at which any appropriation is expended during the period of the appropriation by allotment or other means." That includes but is not limited to the "allotment" and 3% restriction authority in the Executive Budget Act. Under the second, not properly at issue here as discussed in part II but nonetheless discussed in part III, the governor "may reduce the expenditures of the state or any of its agencies below their appropriations whenever the actual revenues are less than the revenue estimates upon which the appropriations were based." The ultimate result of the combination is that the governor can—to a degree substantially beyond prior law—control state spending so that the state can spend what it needs, but cannot spend more than it has.

2. The budget process before the fiscal year begins.

Budget requests.

In the executive budget process, state budgeting never really ends. During the first half of the fiscal year, departments submit their budget requests or recommendations for the next fiscal year. Those provide much more detail than do the appropriations bills; they include amounts tied to specific projects and purposes that are aggregated into the line items that the General Assembly eventually passes. The Division of Budget and Planning in the Office of Administration gathers those requests for use in preparing the Governor's proposed budget.

Below, the Auditor mentioned two things that occurred in this stage of budgeting: one relates to FY 2012; and other to FY 2013.

First, he mentioned that his office submitted a budget request for FY 2012 that included, as shown in the detailed recommendation, $300,000 for a one-time, comparative performance audit program. *See* Appellant's Brief at 28, 32; LF 55-57. Later in FY 2011, the General Assembly considered S.B. 323, which would have given the Auditor's office authority to conduct that comparative audit. But the General Assembly did not pass S.B. 323.

Second, he referred to instructions by the Division of Budget and Planning. *See* App. Br. at 33 (LF 58-60). Those instructions demonstrate the overlap that occurs among calendar and budget years. The instructions were given in the fall of 2011, during FY 2012. They were instructions by the Division to agencies concerning their development of budget requests for next fiscal year—FY 2013. Because the early revenue forecast for FY 2013 was not encouraging, the Division asked agencies to keep their FY 2013 requests within the limits of the FY 2012 appropriations, less any then-restricted amounts. (LF 59-60). The Auditor interprets these instructions as a declaration that certain appropriations for FY 2012 would not be released regardless of what happened with State income. *See* App. Br. at 33. But the instructions say nothing about what would happen later in FY 2012.

The "consensus revenue estimate."

Above we discussed the development of proposals for the appropriations or expenditure side of the State budget. We now turn to income.

In December each year (the middle of the July-June fiscal year), the Budget Director, Division of Budget and Planning staff, and representatives of the House Appropriations and Senate Budget committees discuss expected revenues for the coming fiscal year. They prepare a "consensus revenue estimate" or "CRE" for the next fiscal year. LF 84. The CRE includes revenue from "individual income tax collections (net of refunds), sales and use tax collections (net of refunds), corporate income and (with a phase out beginning in FY 2012) franchise tax collections (net of refunds), estate tax collections, beer and liquor tax collections, and county foreign insurance tax collections (net of refunds), as well as federal reimbursements, interest and other miscellaneous revenues (net of related refunds)." LF 85.

But the CRE does not include all of the revenue that is expected to or may reach the state treasury during the next fiscal year. For example, the CRE does not include federal revenues deposited outside of General Revenue, nor does the CRE include revenues received into specific funds created by law or the Missouri Constitution. *Id.* The CRE does not purport to forecast even the total amount of General Revenue available for appropriation. *Id.*

The governor's proposed budget.

In January, the governor proposes a budget to the General Assembly for the succeeding fiscal year. A copy of the Governor's proposed budget for FY 2012 is in the Legal File at 109-364; it includes the CRE at p. 10 (LF 129). The proposed budget included $8,330,103 for the Auditor's office—the full amount of the request the office submitted during the fall of 2010. LF 326. The Auditor later requested an additional $300,000 for a one-time comparative performance audit. LF 88.

Each year, in addition to proposing line items for various departments and stating revenue projections for sources covered by the CRE and for sources outside the CRE, the governor recognizes that the State may have to spend more than the face amount on appropriations that are defined only with "estimated" amounts. And the governor recognizes that when the

General Assembly returns during the fiscal year (*e.g.*, in January 2012), it will enact supplemental appropriations. To permit such appropriations, the governors' budgets typically propose that the General Assembly not appropriate a specified amount of expected revenue—for FY 2012, $120 million. LF 130; *see also* LF 64.

Appropriations by the General Assembly.

The Constitution assigns the General Assembly, having received the governor's proposed budget, responsibility to appropriate funds for various departments and programs—and for enacting legislation to raise sufficient revenue to fulfill those appropriations. As to revenue, during the legislative session that precedes the beginning of the fiscal year, the General Assembly has before it both the CRE and the Governor's proposed budget for the coming fiscal year. So in 2011 the General Assembly had before it two estimates for revenue to be received in FY 2012: the Governor's proposed budget for FY 2012; and the CRE (printed within the Governor's proposed budget). But that is not all the pertinent information that the members of the General Assembly had, individually or collectively. The General Assembly also held hearings on the proposed budget, and presumably members of the General Assembly heard from its own staff, individual constituents, experts, government officials, and others regarding the proposed budget—including estimated or proposed revenue.

And the General Assembly considers non-appropriations bills that affect the revenue that the State will receive. The 2011 session of the General Assembly provides two examples, both pertinent here. First, as part of his constitutional duty to "recommend[]any laws necessary to provide revenues sufficient to meet the expenditures" (Art. IV, § 24), the Governor proposed a tax amnesty program. *See* LF 16, 130. The proposed budget projected that the program would increase revenues for FY 2012 by more than $20 million. *See* LF 97. The General Assembly did not enact such a program. Second, the General Assembly decided to begin phasing out the franchise tax. A.L. 2011, S.B. 19. But the CRE and the Governor's budget had assumed that the franchise tax would remain fully in effect through FY 2012. *See* LF 96-97.

As it does each year to fulfill its constitutional mandate, in 2011 the General Assembly considered the governor's proposed budget, the CRE, its own changes in taxation and other legislation, and other budget information, and enacted a series of appropriations bills for FY 2012. H.B. Nos. 1-13, 17, 21, & 22 (2011). The General Assembly did not announce or affirm the revenue on which it based those appropriations—nor on which it based the supplemental appropriations enacted in 2012 in H.B. 2014.

Planning for the opening of the fiscal year.

As noted above, the CRE is prepared in December and the governor's budget is submitted to the General Assembly soon afterwards. So both the CRE and the proposed budget are prepared months before the General Assembly passes appropriations bills, those bills are signed and take effect, and the fiscal year begins. Meanwhile, the budget director monitors possible changes in expected revenue, as they are affected not just by legislative action (or inaction), but by economic conditions, changes in federal funding, etc. She must ensure that the State is solvent not just for the year, but for every day of the year.

As the beginning of the fiscal year nears, the Budget Director knows the scope of appropriations passed and signed by the governor or vetoed. She knows what legislation was passed that will affect State revenue. Studying economic and other conditions, the budget director may conclude that there would not be enough revenue in the State Treasury in the first part of the fiscal year to allow expenditure of all appropriations—or even all quarterly allotments of such appropriations—on July 1 or soon thereafter. For FY 2012, to prevent the State from being "overdrawn," the Budget Director, at the Governor's direction, took various steps. Among them, she announced that as of the first day of FY 2012, the Governor would impose particular restrictions on spending certain portions of selected appropriations. LF 15-19, 97. By imposing restrictions rather than exercising a line item veto, the Governor preserved the ability to fund the objects of appropriations should it turn out that funds become available.

3. Budgeting during the fiscal year.

Funds that are not spent in one fiscal year remain in the State Treasury for appropriated use during the next fiscal year. The State begins each fiscal year with a balance consisting of those unspent funds. Revenue for the new fiscal year may begin to flow into the State Treasury on July 1, and comes throughout the fiscal year. But the total revenue received during the year does not reach the amount stated in the CRE nor the amount stated in the governor's budget until near the end of the fiscal year—if ever.

Every day, then, someone must look at what is in the State Treasury. Every day, someone must consider how much to allow agencies and officers to spend pursuant to their respective appropriations. And those choices include myriad considerations. For example, payroll must be met twice each month for every agency, so sufficient funds must be available twice each month to make payroll. By contrast, capital improvement spending can usually be deferred. So can expenditures that are dependent on future legislative action.

Again, only a fraction of the revenue for the fiscal year is available on July 1 or soon thereafter. So, to prevent agencies and officials from spending more in the first days, weeks, or months of the fiscal year than is available in the State Treasury, the budget director imposes restrictions on spending. Restrictions come in various forms. As discussed above, the use of some forms precedes the 1945 Constitution: a restriction of 3% of many appropriations, and "allotments" that generally restrict expenditures by quarter. § 33.290; § 10906, RSMo 1939. The language of § 27 is broad enough to encompass both—as well as the use of "restrictions" that prevent spending of items or portions of items, as determined by the Governor.

The restrictions announced before July 1, 2011, for FY 2012 were, indeed, restrictions. They were not permanent cancellations of appropriations authority; they merely deferred spending authority until it was certain that funds were available to cover the expenditures. As revenue projections changed, restrictions were lifted or loosened. That happened through the portion of FY 2012 during which the parties were presenting the facts to the circuit court. LF 102. That process of imposing and releasing restrictions necessarily continued through the fiscal year, as the Budget Director monitored both revenues received and expenditures made across state government. She released restrictions when there was sufficient revenue in—or expected to be in—the appropriate Treasury account. That presents a notable contrast to line-item vetoes, which cannot be undone; if a governor vetoes all or part of a line, the vetoed portion cannot be used or restored absent a new appropriations bill.

B. The restrictions imposed for FY 2012 were within the scope of the Governor's authority.

The Auditor challenges the ability of the Governor from the beginning of the fiscal year to match, day-by-day, expenditures with available revenues. The Auditor asks this Court to limit the Governor's authority under Art. IV, § 27 to "control the rate at which any appropriation is expended during the period of the appropriation by allotment or other means"

"Control[ling] the rate at which any appropriation is expended" can be analogized to controlling the water available to tenants in a building where the water is provided from rainwater collected in a cistern. In our analogy, the owners of the building hire agents who negotiate leases with tenants, and a building manager who manages the building, including supplying water to the tenants. The leases, collectively, are entered into on the presumption that the cistern, as it is refilled throughout the year, contains enough water to allow the tenants to draw from its capacity to the full extent of their lease terms. The manager uses the cistern to collect the rainwater, and delivers the water to tenants through a system of valves and pipes. The manager must monitor the water in the cistern each and every day. He can estimate but does not know how much or when water will be deposited in the cistern. He has the ability to control only what flows out of the cistern.

Though each tenant has, in its lease, a right to water for certain purposes—drinking, cooking, bathing, manufacturing, etc.—they understand that their right must be subordinated to the availability of water in the cistern and to the manager's obligation to ensure that there is always water for the most critical needs, such as sanitation (toilets) and fire protection. So the manager uses the valves to regulate how much water is available to which tenants for what purpose at any given time. If there is both plenty of water today and the promise of sufficient replenishment tomorrow, he releases water to all tenants for all purposes. But if water is in short supply—or if the prospect of rain is uncertain—he must prioritize and preserve. For once the manager releases water from the cistern to a tenant, the manager cannot take it back. The manager does not enter tenants' premises, retrieve water from a sink or toilet tank, and refill the cistern. The responsible manager always keeps enough water in the cistern to accommodate at least the most essential needs.

Missouri's executive budget process works that same way. The owners of the building are the people of the State of Missouri. The cistern is the State Treasury. Tax and other revenue are the rain. The budget director and the governor are the building managers. The legislators are the leasing agents. And the agencies are the tenants. The budget director regulates the flow of funds to the agencies using regulations—both statutory (appropriations) and administrative ("restrictions"). The budget director can and must retain enough money in the Treasury to pay obligations already incurred and to meet critical needs, such as payroll, and emergency needs, including natural disasters (especially because the State is largely self-insured). Sometimes the Treasury is not full or the prospects for refilling the Treasury are questionable; *i.e.,* the Treasury does not have enough money to cover all expenditures authorized by appropriations and there is not sufficient assurance that it will be refilled in time for both current obligations and future obligations that fit within appropriations to be met. Then the governor through the budget director, like the building manager, makes choices. Like the manager, he ensures that funds in the Treasury can meet immediate needs and pay obligations already incurred. Naturally, he most readily restricts spending authority that can be most easily deferred, such as capital expenditures or programs subject to future legislative authorization.

In his Point I, the Auditor challenges the Governor's authority to act as the building manager in our analogy. In his view, the Governor impermissibly relied on § 27 to "permanently withhold lawfully appropriated funds before the start of the fiscal year and while actual revenues exceeded estimates." App. Br. at 21. That claim is erroneous as a matter of fact. And what the Governor actually did was permitted by law.

The alleged factual predicate for the Auditor's first "point" is found in the State Budget Director's announcement, just before the beginning of FY 2012, that spending pursuant to certain appropriations would be restricted. The Auditor's reading of that announcement is erroneous in two respects.

First, it was not an announcement of a "permanent" withholding of authority to spend under any of the listed appropriations. Rather, it was a list of spending restrictions that could be reversed at any time. The Auditor concedes that some restrictions were lifted during the fiscal year, even before the case was submitted to the trial court for decision (App. Br. at 29 n. 15).

Second, the announcement was not made "while actual revenues exceeded estimates." But before looking at the record support that the Auditor cites for this argument, we note that legally, the timing is irrelevant. Nothing in the first clause of § 27 speaks of "revenue estimates." That clause is about cash flow. The authority it gives to the governor is broad and unambiguous. The decision of the delegates to the 1943-44 Convention and of the people of Missouri in 1945 was to assign to the governor the authority to determine, day-to-day, what the State can afford to spend, without the need for legislative authority such as that found in § 33.290.

The Auditor's reference in his Point I to revenue "estimates" implicitly imports into the first clause of § 27 some form of the limitation found in the second clause. The second clause grants authority to the governor to actually reduce appropriations, but only when "actual revenues are less than the revenue estimates upon which the appropriations were based." In the trial court, the Auditor argued that limitation also applied to the first clause—the governor's authority to regulate the rate of expenditures. Here, the Auditor apparently abandons his argument that the revenue estimate limitation applies equally to the two clauses of § 27. But he still attempts to import into the first clause *some* form of revenue estimate analysis.

Abandoning wholesale importation of the limitation in the second clause of § 27 was wise. The limitation has no logical application to the first clause. It applies only when "actual [annual] revenues are less than the revenue estimates upon which the [annual or supplemental] appropriations were based." The comparison is between "actual revenues" and "estimates." The Auditor has never suggested that the General Assembly even has an estimate as to the amount of revenue that will come in on July 1, July 2, or any other day—or month, or quarter, or any other period less than the fiscal year. Given that the only identified revenue "estimate[s] upon which the appropriations were based" are annual ones, the "actual revenue" during nearly the whole fiscal year—and certainly during the first months—will always be less than the estimate. So the limitation from the second clause of § 27, if applied to the first clause, would be no limitation at all.

So instead of actually importing the limitation of the second clause of § 27 as he suggested below, here the Auditor makes a less specific—and less grounded—argument. As to grounding or source, he points to no specific language in the Constitution. Instead, he invokes the spirit of the 1945 Constitution's budget language, combined with separation of powers and the appropriations authority of the General Assembly. He would have the Court read into the first clause some limitation on the governor's exercise of his "rate of expenditure" authority. As to content—well, he does not give that limitation express definition. But the phrasing of his Point I and portions of his Argument suggest that he may read the Constitution to imply in the first clause of § 27 some sort of proportionality requirement—*i.e.*, that the governor must treat payroll, capital, and all other appropriations the same, funding each at whatever level matches some current projection of annualized revenue.

That is a curious and troubling proposition. Curious in that it is inconsistent with the "spirit" of the limitation in the second clause of § 27. After all, even the Auditor concedes that "the governor may *choose which appropriations* to reduce when actual revenue does come in less than estimated." App. Br. at 20 (emphasis added). Adding some sort of proportionality or pro rata requirement to the first clause would deprive the governors of that choice.

And troubling, in that it would deprive governors of the authority to restrict expenditures in selected appropriations in order to preserve funding to pay bills coming due that must be paid from another appropriation. For example, a governor would have to treat payroll that must be made today the same as capital expenditures that can certainly be postponed to later in the fiscal year. To use our cistern analogy, the Auditor would say that when the cistern does not contain enough water to fulfill all the tenants' desires, the building manager must dribble out what is available to all uses equally—resulting in insufficient pressure to ensure sanitation and to fight fires. Nothing in the 1945 constitution's language or history supports a "pro rata" limitation on the governor's § 27 authority.

III. The pleadings in this case do not raise and the record in this case does not provide the facts necessary to decide whether in FY 2012 the Governor did or could reduce appropriations pursuant to the second clause of Art. IV, § 27. (Responding to Appellant's Point II and to Point I in part.)

At various times in his "point I" and then in his "point II," the Auditor extends his attack beyond the governor's restrictions on expenditures during FY 2012 pursuant to the first clause of § 27. He purports to attack reductions in appropriations made at the end of FY 2012 pursuant to the second clause—the clause that authorizes governors to "reduce the expenditures of the state or any of its agencies below their appropriations whenever the actual revenues are less than the revenue estimates upon which the appropriations were based." The Auditor does not use the constitution's words, "reduce appropriations." Instead, he speaks of making "permanent" the restrictions on expenditures—the restrictions addressed in our part II and authorized by the first clause of § 27. For example, he uses the "permanently reduce" language in his "point II." (App. Br. at 31). The closest he comes to the constitutional "reduce appropriations" language is where, in his "point I," he says the Governor used "the 'control the rate' provision to *eliminate* appropriations." (App. Br. at 25, emphasis added).

But there is no record here as to any "elimination" of or reduction in any FY 2012 appropriation. That is hardly surprising. The Auditor filed his petition on August 26, 2011, challenging "withholds and reallocations" announced prior to that date. LF 6. He made no reference whatsoever to any reduction in appropriations, nor to the Governor's authority to reduce appropriations pursuant to the second clause of § 27. He made no allegation regarding on what "revenue estimates … the [FY 2012] appropriations were based." He made no claim that the actual revenues for FY 2012 would meet those "revenue estimates."

After the circuit court denied a motion for judgment on the pleadings, in January 2012 the parties filed cross-motions for summary judgment, and argued them in February. That was months before the end of the fiscal year, and thus well before it was possible for the Governor to know whether he could invoke his authority under the second clause of § 27. It was simply not possible for the Auditor to make the record that he would need to challenge reductions in appropriations for FY 2012.

The Auditor apparently understands that he cannot, in extending his attack to reductions in appropriations, simply refer to the announcement of expenditures restrictions made at the beginning of FY 2012 that were the basis for his Petition. So the Auditor searches the record for "two subsequent pronouncements." App. Br. at 33.

The first, disingenuously, is the instruction to agencies developing their ***FY 2013*** budget requests. LF 58-59; App. Br. at 33. That the Budget Director instructed agencies to ask for reduced amounts, on whatever grounds, for the succeeding fiscal year proves nothing about the "permanence" of restrictions imposed during FY 2012. *See* p. 19, *supra.*

The second was a statement by the Budget Director that, as the Auditor paraphrases it, "she hoped there would be **no further** FY 2012 budget restrictions." App. Br. at 33 (emphasis in original), citing LF 58 and audio exhibit D2. Again, that says nothing about the "permanence" of the restrictions the Auditor attacked.

Back in his "point I," the Auditor adds another purported factual basis for his "reduced appropriations" claim. There he broadly states that in some instances, the designated recipients of appropriations "received none of their FY 2012 appropriations because of [the Governor's allegedly] unlawful withholds." App. Br. at 25. To support that statement, the Auditor cannot point to any end-of- or post-fiscal-year evidence. So he points to a page in the document announcing restrictions would be imposed at the outset of FY 2012. *See id., citing* LF 16. That page says nothing about what happened over the course of the fiscal year. Again, given the timing of the motions here, there is no record in this case regarding what happened near or at the end for FY

2012—the only point at which the second clause of § 27, the "reduced appropriations" clause, would come into play.

It might be possible for someone to avoid the need for facts and ask for a declaratory judgment as to the governor's authority to reduce appropriations under the second clause of § 27. But the Auditor never asked the circuit court for such a declaratory judgment. And there does not seem to be any dispute with regard to the governor's authority. The Auditor concedes that in years when the actual revenue does not match the "revenue estimates" on which appropriations were based, the governor does not just have authority to reduce appropriations. He has authority to pick and choose among the appropriation categories to determine where to authorize spending: "the governor may choose which appropriations to reduce when actual revenue does come in less that estimated." App. Br. at 20. That concession is the best reading of the second clause of § 27.

The Auditor attempts to create a dispute not about the governor's authority to choose among appropriations to reduce, but about the extent to which the governor can reduce appropriations overall to a degree that exceeds the shortfall in revenue. Again, he provides no record to support a claim that the Governor did so in FY 2012. The Auditor does talk briefly about the end of FY 2011. App. Br. at 33, citing LF 63, 65. But the Auditor concedes that when revenues ultimately come in under estimates, the governor has authority to reduce appropriations—or, again, to make "withholdings permanent," as the Auditor puts it. And there is no dispute that FY 2011 revenue was less than estimated, and that the Governor had authority to reduce appropriations at the end of FY 2011 pursuant to the second clause of § 27.[4] Nonetheless, the Auditor seems to insist that the Court answer this question: Can a governor use that authority to reduce appropriations in an amount that exceeds the shortfall from the revenue estimates upon which appropriations were based?

Again, that is not a question posed in the petition. But it is easily answered. The language of the second clause is not ambiguous: "whenever the actual revenues are less than the revenue estimates upon which the appropriations were based," the governor "may reduce the expenditures of the state or any of its agencies below their appropriations." The section places no legal limit on the governor's authority, once the prerequisite is met. "Any" gives governors the ability to choose.

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[4] In years when revenue meets or exceeds estimates, the second clause of § 27 would not come into effect. The 3% provision of § 33.290 would still authorize a governor to restrict and carry over that amount from the year's appropriations. In that respect, the statute is not superseded by § 27.

In that respect, the contrast with the 1933 Executive Budget Act is telling. Again, that statute authorized the governor to reduce spending authority whenever "it shall appear that revenues in any fund will fall below the estimated revenues for such fund," but only "to such extent that the total revenues of such fund will be less than the appropriations from such fund." § 33.290. The "to such extent" language could have been carried into § 27. But it was not. The governor was given broader authority to choose among appropriations to reduce, just as he was given authority to choose where and how to regulate the "rate" of spending.

That eliminating the "to such extent" restriction was a wise choice by the drafters of the 1945 Constitution and by the people in ratifying it is shown by recent history. One year of insufficient revenue is often followed by another—and it may be impossible to know that during the legislative session that enacts appropriations for the first of those poor fiscal years. Governors must have the ability to anticipate evolving needs not just for the current fiscal year, but for subsequent ones. Having funds in the Treasury at the end of the fiscal year is necessary not just to enable the General Assembly to fund the government during the next year, but more acutely to fulfill obligations that arise long before the bulk of anticipated revenue for a fiscal year reaches the State Treasury.

The limitation that the Auditor asks the Court to insert into the second clause of § 27, would significantly inhibit the ability of governors to hold sufficient funds to meet needs in the coming year. Those who drafted and those who ratified the 1945 Constitution chose not to include the kind of limitation the Auditor proposes. This Court cannot insert it.

IV. The Auditor did not identify any aspect of a "system of accounts" that he or his predecessors established with which the governor did not comply. (Responding to Appellant's Point III.)

As noted in part I above, if there is a claim as to which the Auditor had standing, it would be the claim made in his third "point"—the only one that deals with his role as State Auditor. There, he alleges that the Governor "fail[ed] to follow generally accepted accounting principles and audit standards set by Appellant [the Auditor, as State Auditor] under sections 29.180 and 29.235.1, RSMO, and in compliance with the implicit requirements of specificity and detail required under Article IV, Sections 23, 24, 25, 26, and 27 in making and documenting those choices." App. Br. at 36. But missing from the Auditor's argument is any reference to any particular "accounting principle" or "audit standard" set by the state auditor, or even a workable description of the "requirements of specificity and detail" that he finds "implicit" in the Constitution. The Auditor leaves us without any standard to apply to the actions of the Governor and his Budget Director—*i.e.*, without having stated a real claim to consider.

We begin with the constitutional claim. The Auditor cites (App. Br. at 37) the requirement in § 23, that "[e]very appropriation law" enacted by the General Assembly "distinctly specify the amount and purpose of the appropriation." And he cites the requirement in § 24 that the governor's proposed budget include "a complete and itemized plan of proposed expenditures." But the specificity required in those sections merely serves to highlight the lack of specificity required in § 27.

We then turn to the statutes. But the Auditor's discussion of those is telling. He says that *he* is required by § 29.235.1 to "follow government auditing standards issued by the Comptroller of the United States." App. Br. at 38. But that statute says nothing about governors. And in his brief here, as in the trial court, the Auditor cites nothing in the Comptroller's "auditing standards" about revenue projections.

The Auditor also cites (App. Br. at 37) but does not actually discuss another statute, § 29.180, RSMo. That statute allows the auditor and the budget director to cooperate to "establish appropriate systems of accounting for all officers and agencies of the state." The systems "shall be adequate to record all assets and revenues accrued, all liabilities and expenditures incurred, as well as all cash receipts and disbursements," etc. "Each department shall keep such accounts in accordance with the system of accounts prescribed by the auditor." But again, it is the Auditor's omission that is most telling: he never points to anything in any "system of accounting" that requires the governor or the budget director to do anything that they did not do with regard to the challenged expenditure restrictions.

Indeed, it is not clear that a state auditor even could "establish" such a system. The statute speaks only of current and past actions: state "assets," "revenues accrued," actual "receipts and disbursements," etc. It says nothing about estimates and projections of assets, revenue, or receipts that the State may or may not have at some future date.

In the absence of some constitutional provision, statute, or at least something in an established "system of accounting" that requires governors and their budget directors to document in particular ways the bases for their estimates of future revenue, the Auditor cannot obtain relief. This Court need not decide whether the Auditor has standing under *Kelly v. Hanson* to assert such a claim against the Governor, for he failed to state such a claim here.

V. The plaintiff did not timely assert a challenge to the constitutionality of "estimated" or "E" appropriations. (Addressing Cross-appellant's Point Relied On 2.)[5]

Respondent-Cross-appellant's Point Relied On 2:

> *The trial court erred in ruling on the constitutional validity of "estimated" or "E" appropriations because the challenge to the validity of those provisions was not raised by the Auditor at the earliest possible opportunity so as to give the trial court authority to rule in that it was not made in the Petition.*

A principal, though sometimes obscured, focus of the Auditor's briefs is the Governor's "transfer" of "funds … from lawful appropriations to other budget line items—in excess of the lawfully appropriated amounts." App. Br. at 16. His reference to "transfers" is simply wrong. Appropriations bills, though not codified, are statutes binding on governors and their subordinates. Governors cannot move appropriations authority from one line item to another. State revenues flow into the State Treasury, and are then

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[5] Such questions of trial court authority, like questions of jurisdiction, are reviewed *de novo*. *E.g., Chamberlain v. Director of Revenue*, 342 S.W.3d 334, 338 (Mo. App. S.D. 2011); *Matthey v. St. Louis County*, 398 S.W.3d 903, 905 (Mo. App. E.D. 2009).

released for spending pursuant to particular appropriations. Funds are never in some pot labeled by appropriation line item, awaiting their turn to be spent, from which they can be removed and placed in a different pot.

The Auditor's real argument is that some portions of some line items—those that are stated with estimates, or "E's," and a purpose—in appropriations bills are unconstitutional, and that governors cannot spend funds pursuant to those lines, in excess of the estimated amount.

Sometimes "E" line items are used because the State's obligations are impossible to determine in advance. Among those is the Legal Expense Fund, used to pay court judgments:

> Section 5.110. There is transferred out of the State Treasury, chargeable to the funds shown below, for the payment of claims, premiums, and expenses as provided by Sections 105.711 through 105.726, RSMo, to the State Legal Expense Fund
>
> From General Revenue Fund. $6,000,000E
>
> From Federal and Other Funds. 757,435E
>
> Total. $6,757,435

H.B. 5, A.L. 2011, p. 50. Absent the "E," once judgments paid reached $6,757,435, payments would stop; further payments would occur only if there were a supplemental appropriations bill for that year, or an appropriations bill for the next year that included funds for such judgments.

To the general public, the most significant of the "unknown obligation" uses of "E" line items is the line for tax refunds:

> Section 4.060. To the Department of Revenue
>
> For refunds for overpayment or erroneous payment of
>
> any tax or any payment that is credited to the
>
> General Revenue Fund
>
> From General Revenue Fund. $1,538,400,000E

H.B. 4, A.L. 2011, p. 37. Absent the "E," once the Director of Revenue paid out $1,538,400,000 in refunds, refunds would stop. Refunds could resume only when a new appropriation became effective.

Another common use of "E" lines is to accommodate income that comes in uncertain and largely unpredictable amounts from third parties, most commonly federal funds and user fees. For example, H.B. 12 (2011) included an appropriation that contains both a federal funds line and a line for funds that come to the judiciary through fees:

> Section 12.310. To the Supreme Court
>
> For the purpose of funding all grants and
>
> contributions of funds from the federal
>
> government or from any other source which

may be deposited in the State Treasury for the use of the Supreme Court and other state courts

Personal Service.	$2,284,380
Expense and Equipment.	5,609,649E
From Federal Funds.	7,894,029

H.B. 12, A.L. 2011, p. 162. The General Assembly estimated the amount to be received and available to the courts in funds for "expense and equipment" as $5,609,649. Determining in advance just how much money might come is impossible. Thus the General Assembly used an "E" to allow the courts to spend whatever money came in. Absent the "E," the courts would have to go to the General Assembly for a supplemental appropriation each time funds became available beyond the stated amounts.

In effect, the Auditor asked, and the trial court ordered, that the "E" be stricken from each of the 2011 appropriations bills, and the appropriations limited to the amount of the stated estimate. In other words, the Auditor argued that the bills were unconstitutional, to the extent they contain "E's."

Missouri courts have a longstanding rule of timing and specificity about constitutional challenges: a "constitutional question must have been presented in the trial court at the earliest opportunity, and the party presenting the constitutional issue must specify for the benefit of the trial court the constitutional provisions which he invokes." *City of Florissant v. Rouillard*, 495 S.W.2d 418, 419 (Mo. 1973). Here, the Auditor did neither. Nowhere in the Auditor's Petition is there any presentation of the question of the constitutionality of any appropriations bills. Not a single bill is mentioned in the Petition. There is not a single reference to any line item in any appropriation. There is no mention of "estimated" or "E" appropriations. And there is no allegation of any constitutional bar on any form of appropriation.

The petition was "the earliest opportunity" for the Auditor to make his constitutional claim. It did not include such a claim. This Court should thus vacate the decision of the circuit court with regard to the validity of estimated or "E" appropriations.

VI. The Missouri Constitution does not deprive the General Assembly of authority to appropriate funds using an estimated figure and specific criteria. (Addressing Cross-appellant's Point Relied On 3.) [6]

Respondent-Cross-appellant's Point Relied on 3:

> *The trial court erred in ruling on the constitutional validity of "estimated" or "E" appropriations because the General Assembly does not lack authority to enact such appropriations in that the General Assembly has plenary authority and no constitutional provision bars the General Assembly from using "estimated" amounts in line items in appropriations bills.*

If the Court does address the validity of "E" appropriations on the merits, it must begin, as always with the presumption of constitutionality given to all statutes: "A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision. The person challenging the statute's validity bears the burden of proving the act clearly and undoubtedly violates the constitution." *Kan. City Premier*

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[6] "This Court reviews a constitutional challenge to a statute de novo." *Kan. City Premier Apartments, Inc. v. Mo. Real Estate Comm'n,* 344 S.W.3d 160, 167 (Mo. banc 2011).

Apartments, Inc. v. Mo. Real Estate Comm'n, 344 S.W.3d 160, 167 (Mo. banc 2011). "This Court 'resolve[s] all doubt in favor of the [statute's] validity.' " *Ocello v. Koster*, 354 S.W.3d 187, 197 (Mo. banc 2011), quoting *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984). "Because a statute is cloaked in a presumption of constitutional validity, a statute may be found unconstitutional only if it clearly contravenes a specific constitutional provision." *Weigand v. Edwards*, 296 S.W.3d 453, 456 (Mo. banc 2009). "A statute is presumed to be constitutional and will not be invalidated unless it clearly and undoubtedly violates some constitutional provision and palpably affronts a fundamental law embodied in the constitution." *Bd. of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 368–69 (Mo. banc 2001) (internal citations omitted), quoted with approval, *State v. Andrews*, 329 S.W.3d 369, 371 (Mo. banc 2010). Those rules are the result of constitutional doctrines such as the separation of powers, and of the concept that although this Court may have ultimate authority to interpret the Missouri constitution, that constitution itself requires the other branches of government, co-equal in power, to also interpret and apply it—and the courts should give respectful credit to their efforts to do so.

Here, we are dealing not with some right promised by the Missouri constitution, but with a procedural question: the form in which the General Assembly must write appropriations bills. The Court must recognize, then, the "fundamental principle" that the General Assembly can write what it wishes, absent a constitutional limitation:

> It is a fundamental principle of constitutional law that a State Constitution is not a grant of power as is the Constitution of the United States but, as to legislative power, it is only a limitation; and, therefore, except for the limitations imposed thereby, the power of the State Legislature is unlimited and practically absolute.

Kansas City v. Fishman, 241 S.W.2d 377, 379 (Mo. 1951), quoted with approval, *Americans United v. Rogers*, 538 S.W.2d 711, 716 (Mo. banc 1976).

Not surprisingly, given that "fundamental principle," this Court has recently observed that "[a]ttacks against legislative action founded on constitutionally imposed procedural limitations are not favored." *Legends Bank v. State*, 361 S.W.3d 383, 386 (Mo. banc 2012). To paraphrase this Court's language in another case, unless "[t]here is [some]thing in the constitution that specifically bars the general assembly from" passing "E" appropriations, to do so is "within the general assembly's power." *Murray v. Missouri Highway and Transp. Comm'n*, 37 S.W.3d 228, 235 (Mo. banc 2001). Or to paraphrase another decision, unless "[t]he constitution … specifically prohibit[s]" "E" appropriations, they are valid—because "[a]bsent a prohibition, the general assembly's legislative power is plenary." *Fust v. Attorney General for the State of Mo.*, 947 S.W.2d 424, 430 (Mo. banc 1997).

The trial court found the requisite "prohibition" in the sentence that concludes Art. IV, § 23, the section establishing "fiscal years":

> The fiscal year of the state and all its agencies shall be the twelve months beginning on the first day of July in each year. The general assembly shall make appropriations for one or two fiscal years, and the sixty-third general assembly shall also make appropriations for the six months ending June 30, 1945. *Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose.*

(Emphasis added.)

There is no doubt that the "E" appropriations "distinctly specify the … purpose of the appropriation." But are they so far from "distinctly specif[ying] the amount" that they are prohibited by our Constitution?

Again, answering that question requires the Court to give as much deference as possible to the other two branches of government—which act jointly as to any appropriation, "E" or otherwise. So the Court should construe that "specificity" requirement generously—and in favor of a longstanding legislative approach that has proven its worth.

That worth is highlighted by a look at the alternatives: to vastly expand the use of supplemental appropriations (and, likely, expensive special legislative sessions); or to replace "E" appropriations with figures that match the maximum that could be received from a particular source or required for a particular purpose. The second alternative would present the legislature with a Hobson's choice. One choice would be to replace "E" appropriations with theoretical maximums. But to pass what on its face, when compared with the CRE and other revenue estimates, would be a balanced budget would then require that the legislature make huge cuts in other line items. Or the legislature could simply ignore that problem, and pass appropriations bills that, in total, add up to far more than the CRE and other estimates could support, knowing that by doing so it deliberately hides the real budget total. None of the options are preferable, in any policy sense, to the current approach.

Philosophically, the Auditor bases his principal objection to the governor's "transfers" of funds to "E" lines in the appropriations bills on the concept of allocation of constitutional powers. The Auditor apparently believes that the "E" gives a governor power that properly resides in the General Assembly. But we conclude with one reminder: the use of "E's" is entirely a legislative choice. The General Assembly has recently recognized that using too many "E's" can be problematic, from its point of view, and has reduced the number in the last fiscal year. But that reduction should be a legislative, not a judicial choice.

CONCLUSION

For the reasons state above, the Court should reverse the decision of the court below because the plaintiff lacked standing. Otherwise, the Court should affirm as to the Governor's authority to restrict the expenditure of funds during a fiscal year, and reverse as to the use of "estimated" or "E" appropriations.

Respectfully submitted,

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CERTIFICATION OF SERVICE AND COMPLIANCE

I hereby certify that on the 8th day of January, 2013, the foregoing brief was filed electronically via Missouri CaseNet and served electronically to:

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I further certify that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 11,360 words.

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